IN THE HIGH COURT OF JUDICATURE FOR RAJASTHAN
BENCH AT JAIPUR

ORDER
IN
S.B. Civil Second Appeal No.173/1986

Suresh Chandra & Dhan Raj
...plaintiff-appellants
Versus
Shri Hanuman Prasad S/o Shri Ganga Ramji & Others
...defendant-respondents

Date of Order ::: 26.7.2006

Hon'ble Mr. Justice Narendra Kumar Jain

Shri J.K. Singhi for plaintiff-appellants
None present for defendant-respondents
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By the Court:-

Heard learned counsel for the plaintiff-appellants.

This second appeal, under Section 100 of the Code of Civil Procedure, on behalf of the plaintiff-appellants, is directed against the judgment and decree dated 8th of February, 1986, passed by the Civil Judge & Additional Chief Judicial Magistrate, Beawar, in Civil Appeal No.58/83, whereby the appeal of the plaintiff-appellants was dismissed against the order dated 23.2.1982 passed by the Munsiff Magistrate, 1st Class, Beawar, whereby the learned lower court allowed the application of the defendants under Order 7 Rule 11 (d) of the CPC and dismissed the suit of the plaintiff-appellants.

The plaintiff-appellants filed a suit for permanent injunction, declaration of title, damages and possession in respect of the property in dispute against the private defendants as well as Nagar Parishad, Beawar.

The defendants no.1 and 2 had entered into a compromise and this fact has a mention in the judgment of the lower appellate court. The defendants no.4 to 7 did not file any written statement. The defendant no.3 Nagar Parishad, Beawar, filed its written statement. It is relevant to mention that no objection in respect of notice under Section 271 of the Rajasthan Municipalities Act, 1959, was taken by the defendant no.3 in its written statement.

On the basis of the pleadings of the parties, the learned lower court framed six issues, as reproduced in the judgments/orders of both the courts below. The plaintiffs examined 10 witnesses and thereafter case was fixed for evidence of the defendants. However, during that stage, the learned counsel for the defendants moved an application under Order 7 Rule 11 (d) of the CPC for rejection of the plaint on the ground that the plaintiffs did not serve a notice, before filing of the suit, under Section 271 (2) of the Rajasthan Municipalities Act, 1959. The learned lower court, vide its order dated 23.2.1982, allowed that application and dismissed the suit of the plaintiffs only on that ground. The learned lower court relied upon a decision of this Court in the case of Nagar Palika Vs. Temple Board, Nathdwara (1981 RLW 239).

Being aggrieved with the aforesaid order of the lower court, dismissing the suit, the plaintiffs preferred an appeal before the first appellate court. Learned counsel for the plaintiff-appellants contended before the learned lower appellate court that the requirement of giving a

notice under Section 271 (2) is not necessary in view of another decision of the Rajasthan High Court in the case of Municipal Board, Nimbahera Vs. Syed Ashaq Ali (1968 RLW 407). The lower appellate court concluded the matter holding that the order of the lower court, based on the decision in the case of Nagar Palika Vs. Temple Board, Nathdwara (1981 RLW 239), is correct and consequently dismissed the appeal of the plaintiff-appellants. Being aggrieved with the same, the plaintiff-appellants filed this second appeal before this court.

This court, vide its order dated 9.9.1986, admitted this second appeal and formulated a substantial question of law as to "whether objection with regard to notice under Section 271 of the Municipalities Act can be waived and it shall be deemed to have been waived if not taken in the written statement?" This Court, in view of two different views on the above question, in the case of Municipal Board, Nimbahera Vs. Syed Ashaq Ali (1968 RLW 407) and Nagar Palika Vs. Temple Board, Nathdwara (1981 RLW 239), directed to place the file before Hon'ble the Chief Justice to constitute a larger bench to decide the above question. The order dated 9.9.1986 reads as under:-

> "Heard learned counsel for the appellants. One of the substantial question of law that arise in this appeal is as to whether objection with regard to notice u/S 271 of the Municipalities Act can be waived and it shall be deemed to have been waived if not taken in the written statement.
>
> Admit. Issue notice.
>
> Learned counsel for the

> appellants brought to my notice Municipal Board, Nimbahera V. Syed Ashaq Ali (1968 RLW 407), wherein the learned Single Judge had held that where giving of notice is not alleged in the plaint nor any objection is taken in the written statement for long time, the plea of want of notice is waived; whereas in a later decision in Nagar Palika V. Temple Board, Nathdwara, another Single Judge without referring to the earlier authority has taken the view that the objection with regard to notice u/S 271 of the Municipalities Act can be taken at a late stage and it will not be deemed to have been waived, if the said objection has not been taken in the written statement.
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> Since there are two views of this very High Court and such questions can arise and do arise in a number of cases, I think it proper to refer the case to a larger bench. The file of this case may be placed before Hon'ble the Chief Justice for constituting a larger bench to decide this the above question."

In view of the above order dated 9.9.1986, the matter was referred to a Division Bench for pronouncement of the authoritative decision on the above question of law. The Division Bench, vide its order dated 9.9.2005, answered the question referred to it, as under:-

> "(1) Section 271 of the Act aforesaid is not a provision of public policy but one for the benefit of the municipality or the persons mentioned therein.
>
> 2. Giving of notice is a condition precedent to exercise jurisdiction. But, this being a mere procedural requirement, the same does not go to the root of jurisdiction in true sense of the term. The indication is clear that the requirement of notice on expiry of a particular period has no jurisdictional

effects.

3. Looking to this nature of the provision of the notice the same is capable of being waived by the defendants and on such waiver the court gets a jurisdiction to entertain and try the suit.

4. The question whether in fact there is waiver or not would necessarily depend on facts of each case, and is liable to be tried by the same court if raised."

The substantial question formulated by this court on 9.9.1986 has been answered by the Division Bench, vide its order dated 9.9.2005. In view of the above answer of the Division Bench in this case itself, the judgment and order passed by both the courts below are liable to be set aside and case is liable to be remitted back to the lower court to proceed further in the suit in accordance with the law as well as decision given by the Division Bench of this Court.

Consequently, this second appeal is allowed. The impugned judgment and order passed by both the courts below are set aside and the case is remanded back to the lower court to proceed further in the suit in accordance with the provisions of law. Cost is made easy.

Registry is directed to send back the record of the courts below immediately.

(Narendra Kumar Jain) J.

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